## BRIEF IN SUPPORT OF PETITION.

### Jurisdiction.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals complained of is claimed under the provisions of Subsection (a) of Section 347 of Title 28, United States Code Annotated, being Section 240 of the Judicial Code as amended. The review is sought by writ of *certiorari*. The judgment complained of was entered upon January 16, 1942. (Tr. 58) The attached petition is filed within the period allowed for the purpose by Section 350 of Title 28, United States Code Annotated.

### Statement.

To avoid repetition the Court is respectfully referred to "Statement of Matter Involved" as contained in the foregoing petition for writ of *certiorari* for full statement of the facts presented by the record which is sought to be reviewed.

## ARGUMENT.

The decision of the Circuit Court of Appeals which is sought to be reviewed here is pitched upon two conclusions of law.

The first of these is that the petitioner "transacted" its "principal business" within the State of Oklahoma and therefore was a resident within the intent and meaning of Section 5 (b) of Oklahoma Income Tax Act of 1935 notwithstanding its corporate domicile in Delaware.

The court's second conclusion was that the said Section 5 (b), as construed and applied to this petitioner, did not

contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

We respectfully urge that both of the above conclusions are erroneous.

The issue upon which the first conclusion was reached resolves itself into a construction of the language of the statute itself. We hope by this brief to demonstrate that the construction given the act by the Circuit Court of Appeals is erroneous by any rule of decision. Further, we hope to demonstrate that the rule of construction applied by Oklahoma to its own similar statutes was readily ascertainable from the published opinions of the Supreme Court of that state, but that the Circuit Court of Appeals disregarded the same contrary to the rule announced in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188. Petitioner's argument therefore naturally stands or falls upon its ability to maintain one or the other of the following contentions:

*(1)* Petitioner did not "transact" its "principal business" in Oklahoma during the years in question.

*(2)* Relevant decisions of the Supreme Court of Oklahoma preclude the construction given the statute by the Circuit Court of Appeals.

If the facts of this case be held sufficient to identify petitioner as a "resident" under the statute in question, we respectfully urge that the statute itself, as construed, and its application to petitioner in the instant situation, contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. We shall hope to demonstrate the infirmity of the statute and its application by the opinions of this Court cited by the Circuit Court of Appeals as the basis for its judgment. We shall further show upon this issue that the deci-

sion of the Circuit Court of Appeals is in direct conflict with a decision of the same constitutional question by the Supreme Court of Wisconsin, which this Court has declined to review.

We address ourselves to the first of our contentions:

## I.

### Petitioner Did Not "Transact" Its "Principal Business" in Oklahoma During the Years in Question.

The statute applied to and enforced against the petitioner was Section 5 (b) of Oklahoma Income Tax Act of 1935, published in appendix to Title 68, Oklahoma Statutes Annotated, and being Chapter 66, Art. 6, Oklahoma Session Laws, 1935. The full text of the questioned statute follows:

> "The term 'resident,' as herein used, refers not only to a resident individual, as defined in Section 4 (j), but, in addition, refers to and includes any corporation whose principal business is carried on or transacted in Oklahoma. Such a corporation shall be deemed to be a resident of this State, for income tax purposes, and its income shall be determined, and the tax thereon collected and paid, as if it were incorporated under the laws of Oklahoma, notwithstanding its corporate domicile is elsewhere."

The respondent and the trial and appellate courts concluded that petitioner's "principal business is carried on or transacted in Oklahoma," that therefore petitioner was a "resident" of Oklahoma by virtue of the statute, and therefore that its intangible properties had tax situs in Oklahoma and the income therefrom was subject to the Oklahoma income tax. The conclusion reached obviously turns upon the construction of the words "principal business is carried on or transacted."

If the mere meeting of directors of a corporation, by

which a course of corporate action is resolved upon, is held to be "transacting business" then petitioner is within the terms of the statute, for there can be no doubt from this record that petitioner's directors held their infrequent meetings within the State of Oklahoma.

If, however, the words "transacting business" be held to mean something other than the mere determination to enter upon a commercial venture, and to refer rather to the commercial traffic, contracts and exchanges undertaken and discharged by petitioner as a corporation with other persons and corporations upon the open markets and channels of trade, then there can be no doubt that petitioner's "principal business" was "transacted" elsewhere than in Oklahoma.

The Circuit Court of Appeals had no difficulty in concluding that petitioner's "principal" business was the acquisiton and holding of intangible investments. It even observed that the corporate investment in mineral properties was of but little consequence in determining the questions involved in the case. We are therefore constrained to confine our discussion, as did the Circuit Court of Appeals, to the corporate operations in connection with its intangible investments, which represented more than ninety per cent (90%) of its entire holdings.

Does a corporation "transact business" within the meaning of the above statute, when its directors meet and resolve that a certain stock should be bought or sold at a stated figure, or does it transact its business within the contemplation of the statute when its officers and agents seek out and approach other trading persons or entities and negotiate and conclude with them the barter determined upon by the directors? If the intra-corporate, policy-determining action of the directors dealing with themselves and each other is the test, the petitioner transacted its business at Tulsa. If

the business transaction referred to by the statute is the dealing of the corporation as an entity with strangers upon the open markets of trade, then each and every function of its business was discharged elsewhere than in Oklahoma.

The only factor of petitioner's dealings in intangibles which is in any degree related to Oklahoma is the occasional meetings of petitioner's directors which took place at Tulsa. Such intangibles as were sold were sold in New York. Such intangibles as were bought were bought in New York. The physical evidences of the intangible property were never within Oklahoma but always were within custody of corporate officers or agents either in Pennsylvania or Delaware. The earnings of the intangible investments were receivable and received at the Delaware office. Accounting of the same was made in the Delaware office. Deliveries of the intangibles were made and received at the Delaware office to or from brokers in New York. The corporate bank accounts were kept at all times outside the State of Oklahoma. The ebb and flow of its moneys occurred solely outside the said state and fluctuated in no important particular by reason of Oklahoma investments or operations.

The fallacy of the conclusion reached by the respondent and the lower courts is perhaps well illustrated if the circumstances be reversed. Suppose the directors' meetings had been held in Delaware, and nothing else had been done there. Suppose that the intangible securities were held, serviced and accounted for in Oklahoma. Suppose that all purchases and sales were contracted for in Oklahoma with residents of Oklahoma. Suppose all deliveries pursuant to purchase or sale were executed upon the markets of Tulsa. Suppose the bank accounts and accounting records had been kept at Tulsa. Would the respondent then say that petitioner's "principal business" was "transacted" in Delaware? We think not.

We regret that we are unable to cite any controlling authority that is directly in point. However, we are able to cite an opinion, of a reputable court, which we believe to be persuasive in the construction debated. We refer to the decision of the Supreme Court of Michigan in the case of *Teagen Transportation Company* v. *Board of Assessors of Detroit*, 139 Mich. 1, 102 N. W. 273, 69 L. R. A. 431. In this case the court undertook construction of a statute which provided for the taxation of personal property of a corporation at the place where it "transacts its principal business." The corporation in question was chartered in Delaware, at which place the meetings of its stockholders and directors were held. All of its other functions were discharged at its office in Michigan. The following is the gist of the decision of the court.

> "Unless we decide that the holding of annual meetings of stockholders and directors is the principal business of said corporations, we must hold that that principal business was not transacted at the place named in the articles of incorporation. It is true that we held in *Detroit* v. *Lothrop Estate Co.*, 11 Det. L. N. 6, 99 N. W. 9, that the principal business was done at the office where the manager resided, and where the managers and shareholders 'meet to do whatever is necessary for them to do.' This by no means decides that the annual meeting of stockholders constitutes the principal business of the corporation. To so hold would, in my judgment, clearly frustrate the legislative purpose. It is said that the personal property of the corporation should be taxable at the place 'where its office is located in its articles of incorporation: * * * *Provided*, its business is actually transacted at such office.' By 'business' the legislature meant something more than the annual meeting of stockholders and newly chosen directors. If it did not, other and more appropriate language would surely have been used. We come, then, to the question, had the lower court the right to infer that the relator corporation did

such business in the City of Detroit as to make their personal property taxable there? We have shown that substantially all the business of relator the Teagen Transportation Company was done in Detroit; that the treasurer of the other relators resided in Detroit had (and, it may be inferred, there exercised) superior powers of business management, and that he there received and disbursed the funds of said corporation except those disbursed for the ordinary running expenses of their boats. If the holding of annual meetings of stockholders and directors did not constitute the principal business of the corporation (and we have stated in our judgment it did not), it follows that the personal property of the corporation was taxable either at the place where it established an 'office for the transaction of its principal business, or, if it had no principal office, then at the place in this state where such corporation transacts business'."

---

The authority is neither controlling nor entirely satisfactory, but it is as close to the exact issue to be decided as we can find. The case of *People, ex rel. General Electric Company*, v. *Barker*, 91 Hun. 590, 36 N. Y. S. 842, announces the general proposition that the *locus* of management is not necessarily the principal place of business, but the case presents a fact situation which is essentially different from the one here presented.

We therefore are compelled to present the question as one not directly decided by any controlling authority. However, we believe that the conclusion, yet to be arrived at, of the Supreme Court of Oklahoma is portended by its opinions in cases construing and applying other similar statutes. We believe that the Circuit Court of Appeals should have been guided by these opinions, and that had it been so guided it would have arrived at an opposite conclusion. This brings us to a discussion of our second point with respect to the statute's construction.

## II.

**Relevant decisions of the Supreme Court of Oklahoma preclude the construction given the statute by the Circuit Court of Appeals.**

The exact section of the statute brought in issue here has never been directly construed by the Supreme Court of Oklahoma. However, the policy of the state with respect to the tax situs of intangibles of foreign corporations has had the repeated attention of the state court in connection with other taxing acts. We respectfully direct the court's attention to the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission*, 173 Okl. 369, 48 P. (2d) 817. This case was brought by this petitioner against this respondent and involved the very same intangibles under the very same circumstances of handling and management involved here. Every circumstance of the case was identical except the taxing statute involved.

The tax involved in the above cited case was the capital stock tax exacted in connection with licensing the corporation to do business in the State of Oklahoma. The pertinent portions of the same were Sections 4 and 6 of Chapter 66, Session Laws of 1931, Oklahoma Statutes 1931, Sections 12376-12378, which were in terms as follows:

> "It shall be the duty of every corporation organized under the laws of this state and of every corporation organized under the laws of any other state, territories, District of Columbia, insular possessions or any foreign country, doing business in this state, to procure annually, from the Oklahoma Tax Commission, a license authorizing the transaction of its business in this state.
>
> "Each such corporation shall pay for such license a fee of one dollar per each one thousand dollars, or portion thereof, of the value of its capital stock employed in Oklahoma, as the value of capital stock em-

ployed in Oklahoma is defined in Section 6 hereof."

Section 6 in part provides:

"For the purpose of computing the amount of license fees hereby imposed and payable by any such corporation, the value of capital stock employed in this state shall be declared to be the value of that portion of the capital stock of the corporation which equals the proportion which the property owned and business done in Oklahoma bears to the total property owned and business done by the corporation."

In the *Chestnut* case, *supra*, respondent had ordered petitioner to attribute the whole of its intangible investments to Oklahoma in its calculation of the capital stock tax due, upon the theory and for the reason that the *locus* of petitioner's management at Tulsa rendered its intangible transactions "business done" in Oklahoma. Thus the same question was presented to the Supreme Court of Oklahoma as was presented here. Can it be urged that there is a difference between "business transacted" and "business done"? We protest that the pivotal phrasing of the two statutes cannot be distinguished. Thus, in our view, the same ultimate decision was required in the *Chestnut* case, *supra*, as is required here.

The Oklahoma court, after detailed examination of the facts, found that the exercise of the management function by petitioner within the State of Oklahoma was insufficient to bring about a tax situs within the state of the intangibles under the definition of the statute which attributed to Oklahoma property localized by "business done" in Oklahoma. The court held that the statute contemplated some actual employment of the capital in Oklahoma transactions, and the opinion is replete with reference to "business transacted" in Oklahoma. The words are so employed as to indicate beyond any shadow of a doubt that the Supreme Court of Oklahoma viewed as necessary to tax situs an actual em-

ployment of the capital in Oklahoma property or in transactions with third parties upon Oklahoma markets. The following is a pertinent quotation from the opinion which will exhibit the identity of the case in point of fact with that at bar.

> "Plaintiff corporation was organized and created under the laws of the State of Delaware and its domicile is in that state. *Bergner & Engle Brew Co.* v. *Dreyfus*, 172 Mass. 154, 51 N. E. 531, 70 A. S. R. 251.
>
> "The rule is that the situs of such intangible property as is sought to be taxed here is, for the purpose of taxation, the domicile of the owner. Cooley on Taxation, Vol. 2, (4th ed.) section 455, p. 1006. See *Kirkland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Northern Central Ry. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88.
>
> "An exception to the general rule is stated in Cooley on Taxation, (4th ed.) section 465, as follows:
>
> > 'While the "undoubted rule is that, for the purposes of taxation a debt is property at the residence or domicile of the creditor," it is also true that a debt may acquire a situs elsewhere. Business situs has come to be a well recognized term in the law of taxation. Primarily it is an exception to the rule that the situs of intangible personal property is at the domicile of the owner, so as to make property which has acquired a "business situs" in a state other than the domicile of the owner taxable in such state. * * *'
>
> "It is stated by the same author that, although the rule is settled that intangible property belonging to a nonresident may acquire a business situs so as to be taxable, yet just what will constitute a business situs is not susceptible of precise definition. The presumption is that the situs of the intangible property sought to be taxed herein is the domicile of the plaintiff, the *State of Delaware, Monidah Trust Co.*, v. *Sheehan*, 45 Mont. 424, 123 P. 692.

"A consideration of the evidence as to where and for what purpose such property is used is necessary to determine whether or not this presumption has been overcome. The testimony shows that all of the stockholders and directors of the plaintiff corporation resided in Tulsa; that the business of the company was transacted from the Tulsa office; that all of the directors' meetings had been held in Tulsa; that it had an assistant secretary at Wilmington, Delaware, who had custody of a part of the intangible property sought to be taxed; that the assistant secretary did not have the right to sell, transfer, or otherwise dispose of this property without the direction of the Tulsa office; that a part of this property was in Pittsburgh, Pa., in the custody of the Union Trust Company, but that this property also was under the absolute control of the company management at Tulsa; that at the time of making the report the business transacted at the Tulsa office consisted of the operation of an office building owned by plaintiff; that it did not buy, sell or deal in stocks, and that the stocks, bonds, etc., held in Delaware and Pittsburgh were held by the company as an investment; that the condition of the securities held in Wilmington, Del., and Pittsburgh, Pa., so far as the control thereof is concerned, has not changed since the organization of the company up until the hearing before the Oklahoma Tax Commission; that the company paid a corporation license tax to the State of Delaware based on the values of the properties in question; that the property was not used in the business of the plaintiff in this state; that the securities, stocks, cash, government bonds, etc., had been virtually the same since the date of the organization or incorporation of the company.

"There is no evidence that these intangibles which are sought to be taxed here were ever within the boundaries of this state. It is true that they were under the absolute control of the directors and officers of the plaintiff corporation who resided in this state, but that alone is not sufficient to create a 'business situs' in this state of these properties so as to render them taxable

here. *In re Pantlind Hotel Co.,* 232 Mich. 330, 205 N. W. 99.

"The corporation is a legal entity separate and distinct from the directors and officers. The residence of the latter cannot affect the domicile of the former, and we do not consider the residence of the directors a determinating factor herein. Control of the intangible property is a factor to be considered, but such control must be so exercised that the intangible property is actually used or employed by the nonresident corporation in its business transacted in this state. There is evidence that these stocks, bonds, etc., were never used in the business of plaintiff transacted in this state. It is true that the evidence also discloses that the plaintiff did not transact business at any other place, but it is not inconceivable that at the time the plaintiff received its charter from the State of Delaware, or at least before it was licensed to do business in this state, it invested a part of its capital stock in the intangible properties which are sought to be taxed here and held them thereafter as an investment. There is no evidence that plaintiff purchased and held these properties in foreign states for the purpose of evading the tax laws of the state and we cannot presume that it did so."

Further, we direct attention to the last paragraph of the above quotation. The Oklahoma court there plainly distinguishes between fixed investment and "transacting business." There is no way that the foregoing opinion can be read to reconcile with the conclusion reached by the Circuit Court of Appeals in the instant case. The Supreme Court of Oklahoma in the *Chestnut* case, *supra,* held that the very intangibles involved here, owned and handled under the identical circumstances involved here, were not present in Oklahoma so as to be subject to taxes, and held this under a statute apportioning investment on the basis of "business done." The Circuit Court of Appeals in the instant case held that the same intangibles used in the same manner were

present in Oklahoma for tax purposes under another statute employing the determinative phrase "business transacted." We do not believe the two conclusions can be reconciled.

We respectfully submit that the issue is one of local law and that the Circuit Court failed to give effect to the rule annuonced by *Erie Railroad Company* v. *Tompkins, supra.* The opinion of the Circuit Court of Appeals (Tr. 53) makes reference to the case of *State* v. *Atlantic Oil Producing Company,* 174 Okl. 61, 49 P. (2d) 534, and *Ford Motor Company* v. *State,* 178 Okl. 193, 62 P. (2d) 48, in a vein which suggests that the holdings of the Supreme Court of Oklahoma in these two cases are inharmonious with the decision in the *Chestnut* case, *supra.* This is not the fact, as an examination of the two opinions will disclose. The *Atlantic* case, *supra,* involved the assessment of a tax upon intangible receivables which were derived from the sale of oil produced in Oklahoma, the sale of which was contracted in Oklahoma, the delivery of which was made in Oklahoma, and the proceeds of which were payable in Oklahoma. The *Ford Motor Company* case involved the assessment of a tax upon intangibles in the shape of notes which were the product of sales of automobiles to persons residing in Oklahoma, out of sales offices located in Oklahoma, and upon deliveries made from places of business in Oklahoma. The Supreme Court of Oklahoma in the two cases mentioned pointed out clearly that these circumstances were sufficient to show that the intangibles themselves were the product of Oklahoma transactions and the result of trading and capital employment in the state. The opinions are not in conflict with the *Chestnut* decision but are converse applications of the rule announced there. Respondent will not be able to demonstrate a want of harmony in the decisions of Oklahoma relative to taxation of intangibles of a foreign corporation. The opinions are wholly consistent and display a

well reasoned and well settled policy of the state, which we believe to be conclusive on the United States courts under the rule announced in *Erie Railroad Co.* v. *Tompkins.*

III.

**Section 5 (b), Oklahoma Income Tax Law of 1935, and its application in the instant case, contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.**

Our proposition to be argued under this contention is that Oklahoma may not by mere legislative definition domesticate a corporation domiciled elsewhere so as to render taxable to Oklahoma property not otherwise amenable to its taxing jurisdiction as defined by the decisions of this Court under the terms of the Fourteenth Amendment to the Constitution of the United States.

By the terms of Section 5 (b) of the law in question, Oklahoma has attempted to declare by legislative fiat that a foreign corporation which transacts its principal business within the borders of Oklahoma, by such fact has rendered itself a resident so as to bring under the dominion of the state all of its property, wherever located, for taxing purposes. The taxing power claimed is made dependent upon no other circumstance than that the "principal business" of the corporation be transacted in Oklahoma. Naturally there is considerable doubt as to the exact meaning of this phrase, but in this case, according to the application made of the statute to this petitioner, the phrase means that a corporation that holds its directors' meetings in Oklahoma must return the whole of its income there. We think the statute is invalid upon any construction of its terms. The construction given the act in this case, however, makes it unconstitutional beyond doubt.

Before adverting to the opinions of this Court which are cited by the Circuit Court of Appeals as supporting its conclusion, we beg leave to direct the Court's attention to an authority of most intimate parallel in issue of fact and law, which was cited to the Circuit Court of Appeals in our brief there. This is the case of *Newport Company* v. *Wisconsin Tax Commission,* 219 Wis. 283, 261 N. W. 884, 100 A. L. R. 1204, cert. den. 297 U. S. 720, 80 L. ed. 1004.

The *Newport* case, *supra,* is of particular interest because it involved a Wisconsin statute which was identical in terms with that involved here, and for the further reason that the application made of the statute by the taxing authorities was identical with that attempted in this case upon facts and circumstances far more favorable to the tax than those presented here. The tax levied in the *Newport* case was an income tax, and was upon profits arising from the sale of intangibles owned by a corporation foreign to the taxing jurisdiction, and held outside the taxing state. There was no question in the *Newport* case but that the "principal business" of the taxpayer was conducted in the taxing state. Its managing officials were residents of the taxing jurisdiction and its corporate fiscal affairs were transacted there. The Supreme Court of the State of Wisconsin, in reviewing the tax assessment, held the tax invalid upon the sole ground that the section defining a foreign corporation to be a "resident" was invalid as contravening the Fourteenth Amendment. The Wisconsin court pointed out that the validity of the statute was to be tested by the decisions of this Court. After marshalling the whole course of decisions upon the subject as reflected by the opinions of this Court, it held that the statute plainly violated the Fourteenth Amendment and therefore was void. The following is the gist of the decision.

"The state's next contention is that the State of

Wisconsin, if the taxpayer's principal business is located here, may, by legislative fiat, domesticate the corporation for purposes of taxation, and by this process give to its intangible property a local status. Reliance is had upon 2 Cooley, Taxation, Secs. 911 and 914; *Metropolitan Life Ins. Co. of New York* v. *Board of Assessors,* 115 La. 698, 39 So. 346, 9 L. R. A. (NS) 1240, 116 Am. St. Rep. 179; *Ricker* v. *American Loan & Trust Co.,* 140 Mass. 346, 5 N. E. 284; *Hubbard* v. *Brush,* 61 Ohio St. 252, 55 N. E. 829. It seems evident to us that a state may not, by definition, construction, or other process, domesticate a person or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation. To say that it may do so is to contend that the limits of the state's jurisdiction to tax are wholly self-imposed. But it is claimed that, conceding this, a state, as a condition to admitting foreign corporations to do business within the state, may require that the corporation so admitted be taxed upon the same basis as domestic corporations. There are two answers to this: First, section 71.02 (3) (e) was not enacted as a condition to the consent of the state that foreign corporations transact business in Wisconsin; nor was it in existence when this taxpayer was so licensed. Second, assuming that it does constitute a condition, its effect is to attach an unconstitutional condition to the consent that the foreign corporation transact business within the state. The earlier cases in the United States Supreme Court held that a state may impose a tax upon the exercise by a corporation, chartered elsewhere, of its corporate privilege wihin the state, and that the amount or character of the tax is wholly within the discretion of the state. *Home Insurance Co.* v. *New York,* 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 395, 12 S. Ct. 403, 36 L. ed. 164; *Maine* v. *Grand Trunk Ry Co.,* 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994: 1 Beale Conflict of Laws, pp, 627 to 629.

However, this view did not survive. In *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355, it was held that a Kansas statute, which made it a condition of foreign corporations entering the state that they should pay a tax or fee consisting of a percentage of their total authorized capital, was invalid, as an unlawful interference with interstate commerce, and as an attempt to tax property outside the state. This decision was followed by a series of cases, notably *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 S. Ct. 232, 54 L. ed. 378; *Atchison, T. & S. F. R. Co.* v. *O'Conner,* 223 U. S. 280, 32 S. Ct. 216, 56 L. ed. 436, Ann. Cas. 1913C, 1050; *Looney* v. *Crane Co.,* 245 U. S. 178, 38 S. Ct. 85, 62 L. ed. 230; see 1 Beale, Conflict of Laws, pp. 629 to 634. See also, 'Indirect Encroachment on Federal Authority' T. R. Powell, 31 Harvard Law Review 321, 572, 721, 932. Professor Beale states: 'Where a state imposes a tax upon a foreign corporation for the privilege of doing local business based upon its entire capital stock which represents in part property permanently outside the taxing state, the tax, though in form an excise, is in effect a tax upon the property. The imposition of such a tax is an attempt to tax property beyond the state's control and is invalid. * * * In each one of the cases cited, the corporation was engaged in interstate commerce. But the vice of taxing extra-territorial values, one of the grounds for the decision here discussed, is equally open to condemnation whether the corporation is doing interstate and local or a purely local business.'

"While the cases and discussion were not addressed to a situation identical with that presented here, they establish principles that are clearly applicable. Assuming that section 71.02 (3) (e), domesticating foreign corporations having their principal business in Wisconsin for the purpose of taxation, constitutes a tax imposed as a condition to the transaction of business in the state, or as a fee for that privilege, it is invalid under the decisions as an attempt to reach property of a foreign corporation which is beyond the taxing jurisdiction

of the state. The cases cited by the state all antedate the *Western Union Tel. Co.* case, and presumably do not survive the rule of that case. While there is much to be said for the contention that the state has unlimited power to exact these conditions, this contention has been repudiated by the United States Supreme Court, and we are bound by the determinations of that court. We also see some merit to the contention of the state that since taxes are thought to have some relation to the protection furnished to the taxpayer, there are more substantial grounds for giving to the state, where the principal business is conducted, jurisdiction to tax all its income, rather than the state of its domicile, to which, in many cases, its only real relation is that it has filed articles of incorporation there. Since this is not a matter of first impression, or even a matter for us to determine, except as we follow the rule of the United States Supreme Court, further discussion would not be profitable."

Obviously the authority is not controlling upon this court. However, we respectfully remind the court that the Wisconsin Tax Commission petitioned *certiorari* to review the decision, and that notwithstanding the fact that the case was decided solely upon a point of Federal Constitutional Law, and involved solely a construction and application of the opinions of this court, the review was denied, 297 U. S. 720, 80 L. ed. 1003.

The *Newport* case was called to the attention of the Circuit Court of Appeals. That court acknowledged that the case was in point and supported petitioner's contention (Tr. 55-56). However, the Circuit Court of Appeals felt that the subsequent opinions of this court in the cases of *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, and *Conn. General Life Insurance Company* v. *Johnson*, 303 U. S. 77, portend a different attitude of this court at the present date than was held at the time *certiorari* was denied in the case of *Newport* v. *Wisconsin, supra.*

We have examined the opinions of this court in *Wisconsin* v. *J. C. Penney Company* and *Conn. General Life Insurance Company* v. *Johnson, supra,* in detail and in vain to ascertain wherein their intendments demonstrate that the circumstances of this case warrant the extension of the taxing jurisdiction of Oklahoma to the intangibles of this petitioner. As we read the opinions last referred to and apply them to the facts at bar, they suggest that the test for the determination of the power of a state to exact this tax is whether or not there is any reasonable relation between the production of income and the opportunities given and the protection afforded by the existence of the state as an orderly, civilized society. The following quotations from *Wisconsin* v. *J. C. Penney Co., supra,* are in our judgment the key to its holding:

> "* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."
>
> "* * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

It is our opinion that these authorities support our contention that the statute is invalid, rather than argue its constitutional sufficiency. Just what relation the existence of Oklahoma as an orderly and civilized society had to do with the production of the income sought here to be taxed we are at a loss to say. The sovereignty of Oklahoma had nothing

to do with the protection of the intangibles themselves from theft or physical depreciation. They rested in security in vaults in Delaware because that state existed as an orderly society. Order in Oklahoma certainly had nothing to do with opportunity or facility of acquisition, sale or exchange of the intangibles. Those transactions were made possible and convenient by reason of the existence of an ordered society and sovereignty in the State of New York. Dividends and interest were not rendered collectible upon the intangibles by reason of any function of government in Oklahoma, but because the channels of commercial traffic were kept open by the sovereignties of New York, Pennsylvania and Delaware. Petitioner does not owe its corporate existence to Oklahoma but to Delaware. In short, no dollar's difference would have been reflected in the income sought to be taxed if Oklahoma had continued to exist in the condition of savagery from which it is so recently sprung. The stocks and bonds would have been bought in the same manner at the same places and from the same persons; and the interest and dividends would have been paid in the same amounts and at the same places and been accounted for and disposed of identically whether or not an orderly government or a civilized society had existed in Oklahoma during the years in question.

The only service that can be attributed to orderly government in Oklahoma is that the directors were permitted to convene within its borders, presumably without breach of their peace. If this be deemed sufficient contribution to petitioner's corporate welfare to render the proceeds of the whole of corporate operations amenable to the taxing will of Oklahoma, then petitioner owes the tax as assessed and this petition should be denied. We must suggest, however, that no opinion of this court, or to our knowledge, of any court, has attempted to extend the taxing sovereignty of a state this far, and the implications of such a decision can-

not but portend the death of corporate entity. Stripped of all disguise, the destruction of the corporate entity is the true objective of the act in question. The real, underlying reason that this income is sought to be taxed is that the stockholders of petitioner are residents of Oklahoma. Whether or not the fiction of corporate entity is obsolete and undesirable in the light of modern social developments is not the subject of this argument, and we shall not attempt to debate it here. But we do say that if the entity theory of corporate existence is to be discarded or destroyed it should be done forthrightly and directly and not by indirection through the taxing power.

We therefore submit that under the past decisions of this and other courts the statute here involved, and the application of the same to your petitioner have exceeded the constitutional limitations placed upon the taxing power of the several states.

## IV.

### Petitioner's Intangibles Did Not Have "Business Situs" in Oklahoma During the Years in Issue.

This proposition is presented only because the trial court held the income to be taxable as having "business situs" in Oklahoma independent of the applicability or validity of Section 5 (b), Oklahoma Income Tax Act 1935, *supra*. The Circuit Court of Appeals ignored this decision of the trial court, and we mention it here only for the reason that it might be urged by the respondent as grounds for affirming the decision of the Circuit Court of Appeals.

Of course, the question of "business situs" is a local one. The policy of the State of Oklahoma with respect to these very intangibles, owned by this very petitioner, has been decided in the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission, supra*. The Supreme Court of

Oklahoma has flatly held that these very intangibles did not have "business situs" in Oklahoma. The trial court ignored the decision and applied the decision of this court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193. We are content to rest our case in this regard upon the decision of the *Chestnut* case hereinbefore cited and insist the question is within the rule of *Erie Railroad Company* v. *Tompkins*, *supra*.

### *Conclusion.*

In conclusion we respectfully urge that the decision of the Circuit Court of Appeals is erroneous and should be reviewed for the reason that it announces unwarranted extension of the power of a state to tax property beyond its sovereignty. The decisions of the federal courts are closely watched at this time both by state officials and by taxpayers to sense the pulse and trend of constitutional law as the same is related to taxation. A refusal of this writ will be widely interpreted as a warrant to state taxing bodies to cross state lines at will in pursuit of other sources of revenue. If it is felt that the decision of the Circuit Court of Appeals is right and expresses the true constitutional policy of the United States, then we respectfully suggest that this case be reviewed and affirmed, that there shall be no doubt in the minds of corporate taxpayers of the purport and extent of their rights. If the decision be wrong there is more at stake in a failure to review the case than the incidental loss to this petitioner of taxes paid.

We respectfully pray that the writ be granted and that the judgment of the Circuit Court of Appeals be reversed and the trial court directed to enter judgment as prayed for by petitioner.

Richard B. McDermott,
*Counsel for Petitioner.*

Charles A. Coakley,
G. Ellis Gable,
*Of Counsel.*